The Writ of *Habeas Data**

by

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All over the world, judiciaries have been entertaining complaints and issuing writs pursuant to their task of pacifying disputes and resolving conflicts—more importantly, in guaranteeing the protection and vindication of rights of the individual against violations by public authorities and private entities.

In the history of law, filing an individual petition before courts to invoke constitutional rights has long been granted a substantive recognition. The first and perhaps most famous of these is the petition for a writ of *habeas corpus*, roughly translated, "You should have the body." The writ of *habeas corpus* is a guarantee against deprivation of liberty of a person. It originated in the Middle Ages in England, recognized in the several versions of the *Magna Carta*, so that a person held in custody is brought before a judge or court to determine whether the detention is lawful or otherwise.

Aside from the writ of *habeas corpus*, several writs have been developed to protect the rights of the individual against the State. In the United States of America, the writs of *mandamus*, prohibition, and certiorari are used to command a governmental agency to perform a ministerial function, prohibit the commission of an illegal act, or correct an erroneous act committed with grave abuse of discretion. In the Latin American

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* Delivered on November 19, 2007, UNESCO Policy Forum and Organizational Meeting of the Information for all Program (IFAP), Philippine National Committee.

countries, particularly Mexico and Argentina, they crafted the writ of *amparo* which protects a whole gamut of constitutional rights. In Taiwan, they have the writ of *respondeat superior* that makes a superior liable for the acts of the subordinate. There are other mechanisms to protect human rights, but the most recent of these legal mechanisms is the writ of *habeas data*.

The *habeas corpus* writ has been used for more than five centuries now. The writ of *amparo* has been used in Mexico in mid-19th century. Compared to those two, the writ of *habeas data* has a very short history.[1] The writ of *habeas corpus* can be traced way back to as early as 1215 in the United Kingdom and subsequently codified in 1679;[2] the writ of *amparo* first appeared in the State of Yucatan in 1841 and later in the Federal Constitution of Mexico in 1857. The roots of the writ of *habeas data* can be traced to the Council of Europe's 108th Convention on Data Protection of 1981. The writ of *habeas data* may be said to be the youngest legal mechanism to appear in the legal landscape. A comparative law scholar has described *habeas data* as "a procedure designed to safeguard individual freedom from abuse in the information age."[3]

The European Data Protection Convention of 1981 was convened to develop safeguards to secure the privacy of the individual by way of regulating the processing of personal information or data. In countries like Germany, the use of the writ of *habeas data* was justified by invoking the

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1 *See* Andres Guadamuz, *Habeas Data and the European Data Protection Directive*, THE JOURNAL OF INFORMATION, LAW AND TECHNOLOGY (JILT) (2001).

2 The Habeas Corpus Act of 1679. *See* 1 BLACKSTONE, COMMENTARIES 131 (1st ed. 1765-1769).

3 ENRIQUE FALCON, HABEAS DATA: CONCEPTO Y PROCEDIMIENTO 23 (1996) (translation provided).

people's right to individual self-determination. In Latin American countries, however, it found use as an aid in solving their perennial problem of protecting the individual against human rights abuses.

Looking at the landscape of several Latin American countries, one will find that the writ of *habeas data* has been embedded as a direct constitutional right.[4] The scope and concept of this writ vary from country to country; but in general, it is designed to protect – by means of an individual complaint presented to a constitutional court – the image, privacy, honor, information self-determination and freedom of information of a person.

The first Latin American country to adopt the writ of *habeas data* is the Federal Republic of Brazil. In 1988, the Brazilian legislature voted a new Constitution, which included a novel right: the right to initiate a *habeas data* complaint on the part of a citizen. It is expressed as a full constitutional right under Article 5, Title II of the 1988 Brazilian Constitution, which I quote:

> *Habeas Data* shall be granted: (1) to ensure the knowledge of information related to the person of the petitioner, contained in records or databanks of government agencies or of agencies of a public character; (2) for the correction of data, when the petitioner does not prefer to do so through a confidential process, either judicial or administrative.[5]

This constitutional provision was further bolstered by Brazil's National Congress in a 1997 regulatory law (*Congreso Nacional de Brasil, Lei 9507).*

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4 Andreas Guadamuz, *Habeas Data: An Update on Latin America Data Protection Constitutional Right*, paper presented during the 16th BILETA Annual Conference, Edinburgh, Scotland, April 9-10, 2001.

5 1988 Constitution of the Federal Republic of Brazil, Art. 5, §71. *Available online at:* http://www.georgetown.edu/LatAmerPolitical/Constitutions/Brazil/brtitle2.html (last accessed November 15, 2007).

Following the Brazilian example, Colombia incorporated the *habeas data* right in its 1991 Constitution. The 1991 Colombian Constitution, as reformulated in the 1997 version, recognizes the right to individual privacy and recognizes that the citizens shall have "the right to know, access, update and rectify any information gathered about them in databases, both public and private."[6] In due time, many countries followed suit and adopted the new legal tool in their respective constitutions: Paraguay in 1992, Peru in 1993, Argentina in 1994, and Ecuador in 1996.

The 1992 Paraguay Constitution follows the model set by Brazil, but has a stronger protection. Article 135 of the Paraguayan Constitution provides:

> Everyone may have access to information and data available on himself or assets in official or private registries of a public nature. He is also entitled to know how the information is being used and for what purpose. He may request a competent judge to order the updating, rectification, or destruction of these entries if they are wrong of if they are illegitimately affecting his rights.[7]

Aside from giving individuals the right to find out what information is being kept about them, the writ of *habeas data* seeks to protect the right to find out what use and for what purpose such data are being collected. The petitioner is also given the opportunity to question the data and demand their "updating, rectification, or destruction."[8]

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6 1997 Colombian Constitution, Art. 15 (*Constitucion Politica de Colombia), available online at* http://www.georgetown.edu/LatAmerPolitical/Constitutions/Colombia/Colombia.html (last accessed November 15, 2007).

7 1992 Paraguay Constitution, Art. 135, translated by Peter Heller, *available online at* http://www.uni-wuezburg.de/law/pa00t__.html (last accessed November 15, 2007).

8 *Id.*

The Peruvian Constitution also recognizes the writ of *habeas data*. In Article 200, Section 3 of the Constitution of Peru, a similar provision much like Brazil's and Paraguay's can be found. More than that, their legislature was quick enough to provide for a regulatory law that took effect on April 18, 1995. The law recognized not only the procedural guarantees of updating one's data as contained in manual or physical records, but also recognizing one's right to update one's "automated" data – those personal data kept and supplied by any "information service, automated or not."[9] In this model, the *habeas data* remedy may be enforced against automated or digitized records.

In Argentina, the writ of *habeas data* is not specifically called "*habeas data*" but is subsumed by the Argentine writ of *amparo.* Under Article 43 of the Argentine Constitution, entitled "The Writ of *Amparo"* or protection, it is stated thus:

> Any person may file this action (referring to the writ of *habeas data*) to obtain information on the data about himself and their purpose, registered in public records or data bases, or in private ones intended to supply information; and in case of false data or discrimination, this action may be filed to request the suppression, rectification, confidentiality or updating of said data. The secret nature of the sources of journalistic information shall not be impaired.[10]

The Argentine version, though not called *habeas data*, is more comprehensive than other Latin American models. Like the Paraguay model, the Argentine version includes the judicial remedy to enforce one's right to access, rectify, update, or destroy the data. This model also

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[9] 1993 Peruvian Political Constitution (*Constitucion Politica del Peru*), Art. 2, §6.

[10] Constitution of the Argentine Nation of 1853, as amended by the 1994 Constitutional Reform, Article 43 (as translated by the Argentine Congress).

guarantees the confidentiality of personal or private information and makes specific the protection of journalistic privilege, of the lofty democratic role of the press.

Several studies in legal literature deal with the varying effects of the writ of *habeas data.* Legislatures in Latin America and in Europe are constantly reviewing the parameters of the writ and the extent of its regulation. The writ ought to be constantly reviewed, especially in this age of Information Technology, when privacy can easily be pierced by the push of a button. But these studies undeniably show that the writ of *habeas data* has become "an excellent Human Rights tool mostly in the countries that are recovering from military dictatorships."[11]

In Paraguay, for instance, an action for a writ of *habeas data* was filed to view police records bringing to light several atrocities that had been committed at that site. In Argentina, the Argentine Supreme Court ruled that the writ of *habeas data* was available to the families of the deceased in a case involving extralegal killings and enforced disappearances. It gave the victims access to police and military records otherwise closed to them. In essence, the decision established a right to truth.

The right to truth is fundamental to citizens of countries in transition to democracy, especially those burdened by legacy of massive human rights violations. This right entitles the families of disappeared persons to know the totality of truth surrounding the fate of their relatives. The exercise of the right is particularly crucial in disappearances driven by politics, because they

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[11] Guadamuz, *Habeas Data*, n.43.

usually involve secret execution of detainees without any trial, followed by the concealment of the body with the purpose of erasing all material traces of the crime and securing impunity for the perpetrators. Indeed, truth is the bedrock of all legal systems, whether the system follows the common law tradition or the civil law tradition. Justice that is not rooted in truth is injustice in disguise. That kind of justice will not stand the test of time, for it is not anchored on reality but on mere images.

Recently, the Supreme Court *En Banc* promulgated the Rule on the Writ of *Amparo*. The Philippine version of the writ of *amparo* is designed to protect the most basic right of a human being, which is one's right to life, liberty and security guaranteed by all our **Constitutions** starting with the **1898 Declaration of Philippine Independence** and the **Universal Declaration of Human Rights of 1948**. We are studying further how to strengthen the role of the judiciary as the last bulwark of defense against violation of the constitutional rights of our people especially their right to life and liberty by the use *habeas data.* It is our fervent hope that with the help of the writ of *habeas corpus*, the writ of *amparo* and the writ of *habeas data*, we can finally bring to a close the problem of extralegal killings and enforced disappearances in our country, spectral remains of the Martial Law regime.

A pleasant day to all.